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Statute:
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*):

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 208

NATIONAL MINERAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. A. 116–124)[1] is reported in 134 F. (2d) 424. The findings of fact, conclusions of law and order of the National Labor Relations Board (B. A.

[1] Appendices filed below to the Board's main brief, petitioner's main brief and the Board's reply brief will be referred to respectively as "B. A.", "R. A.", and "App." Occasional references to the transcript in the representation proceeding and to the transcript made in the complaint proceeding will be designated "Rep. Tr." and "Tr.", respectively.

201–241) are reported in 39 N. L. R. B. 344. The decisions of the Board in a prior representation case which forms a part of the record in this case (B. A. 175–185) are reported in 25 N. L. R. B. 3 and 27 N. L. R. B. 432.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 30, 1943 (R. A. 135). The petition for a writ of certiorari was filed on July 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 9 (d) and 10 (e) of the Act.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board acted arbitrarily in conducting an investigation and holding an election pursuant to Section 9 (c) of the Act.

2. Whether the Board erred in refusing to hear as part of its investigation of the question concerning representation evidence offered by petitioner to prove that some of the authorization cards submitted by the labor organization to the Board, not as proof of its majority, but as proof that sufficient of petitioner's employees desired representation by the union to warrant the holding of an election, had either been forged or had been obtained by misrepresentations of fact.

3. Whether the scope of judicial review provided for by Sections 9 (d) and 10 (e) of the Act with respect to a certification issued by the Board in representation proceedings under Section 9 (c) of the Act satisfies the requirements of the Fifth Amendment.

4. Whether the court below erred in denying petitioner's motion to dismiss the case as moot because of an alleged change in the nature of its business.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix (*infra,* pp. 14–16).

STATEMENT

On March 19, 1940, Beauticians' Supplies and Cosmetic Workers Union, Local 21107 (A. F. of L.), hereinafter called Local 21107, filed with the Board a petition for investigation and certification of collective bargaining representatives, pursuant to Section 9 of the Act (B. A. 175–176, R. A. 35–36). On April 29, 1940, an amended petition was filed substituting as the petitioning organization, a successor union, Chrome Furniture Handlers and Miscellaneous Crafts Union, No. 658, affiliated with Upholsterers' International Union of North America (A. F. of L.), hereinafter called the Union (B. A. 175, R. A. 34–35). After a hearing before a Trial Examiner participated in by petitioner and the Union (B. A.

176), the Board on July 2, 1940, issued its decision and direction of election setting forth its findings of fact which, in brief, are as follows:[2]

Petitioner at its Chicago, Illinois, plant manufactures and sells chrome furniture, beauty-parlor equipment, cosmetics, and other supplies, and is engaged in interstate commerce (B. A. 176–177; 186–188).

On several occasions between November 30, 1939, and February 8, 1940, and thereafter, Local 21107, through its business agent, requested petitioner to recognize it as the exclusive bargaining agency of petitioner's employees (B. A. 177; R. A. 8, 12–13, 20–21). Recognition, as well as request for a consent election, were refused by petitioner for the alleged reason that they would constitute an illegal encouragement of membership in Local 21107 (B. A. 178; Rep. Tr. 38, 40–41, R. A. 10–13, 22–23, App. 15–16). On February 12, 1940, in protest against petitioner's refusal to grant it recognition as the exclusive representative of the employees, Local 21107 called a strike at petitioner's plant which ended February 19, 1940, although Local 21107 had not yet obtained recognition (B. A. 178; Rep. Tr. 35, 66, 144).

In March 1939, as a consequence of petitioner's refusal either to accord it recognition or to con-

[2] In the following statement references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

sent to an election, Local 21107 filed its petition with the Board for investigation and certification of representatives (B. A. 176–178; R. A. 35–36, Rep. Tr. 64–67). Later that month, Local 21107, pursuant to action of its executive board, surrendered its charter as a federal labor union of the American Federation of Labor[3] and secured a charter from the Upholsterers' International Union of North America as Local 658 thereof (B. A. 178; App. 24–27). Thereafter, the amended petition for investigation and certification was filed, substituting the name of the Union as the successor to Local 21107 (B. A. 178; R. A. 34–35).

Petitioner, at the hearing upon this petition, stipulated that 288 authorization cards designating Local 21107 as a bargaining agent reflected a substantial interest in representation on the part of that local and waived the right thereafter to contest the genuineness of the authorizations (B. A. 178, 180; App. 19–24, Rep. Tr. 83–84, 154).[4] Petitioner stipulated further that the Union was the only labor organization seeking to represent its employees (B. A. 178; App. 13, Rep. Tr. 45).

[3] The affiliation of federal labor unions to International unions is a customary process and is characteristic of the American Federation of Labor union structure.

[4] Petitioner's concessions with respect to the cards apparently resulted from its unwillingness to submit to the Board a copy of its pay roll (Rep. Tr. 11–13, 51, 83–84, 169, 188–193). There were apparently about 484 persons employed in production prior to the outbreak of the strike (B. A. 180; Rep. Tr. 196–198).

Subsequently, petitioner offered to prove by cross-examination that the Union's successorship to Local 21107 had not been effected in accordance with the latter's constitution or bylaws (R. A. 25, 27–28); it further offered to prove that some of the 288 authorization cards had either been forged or had been obtained by misrepresentations of fact (R. A. 27–28). These offers of proof were rejected by the Trial Examiner (Rep. Tr. 184–185). In view of petitioner's stipulations and the facts surrounding the establishment of the Union (*supra,* pp. 4–5), the Board found that "a substantial number of employees" desired to be represented by the Union, and ruled that it was therefore immaterial whether or not a "valid" successorship was effected, or that some of the authorization cards may have been forged or obtained by misrepresentations of fact (B. A. 176, 178, 180).

Upon the foregoing findings, the Board concluded that (1) a question affecting commerce had arisen concerning the representation of petitioner's employees (B. A. 179); (2) petitioner's hourly paid production employees at its Chicago plant constituted a unit appropriate for the purposes of collective bargaining (B. A. 179); and (3) the question concerning representation could best be resolved through an election by secret ballot, wherein the employees in the appropriate unit could determine whether or not they desired to be represented by the Union (B. A. 180). Accord-

ingly, the Board directed that such an election be conducted by its Regional Director (B. A. 181–182).

At the election held on July 23, 1940, at Chicago, Illinois, a majority of the votes cast were for the Union (B. A. 183). Accordingly, on September 24, 1940, after reviewing petitioner's objections to the conduct of the election and to the election report of the Regional Director, and finding these objections to be both immaterial and without merit, the Board certified the Union as the exclusive representative of the employees in the appropriate bargaining unit for the purposes of collective bargaining (B. A. 183–185; R. A. 99–106).

On February 28, 1942, following the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law and order (B. A. 201–241). Insofar as here material, the Board found that petitioner, despite numerous requests, refused to bargain collectively with the Union, although the Board had theretofore certified it as the exclusive representative of the employees (B. A. 233; 165–166, 121–122, 136–139, 165–167).[5]

The Board concluded that petitioner's refusal to bargain with the Union was an unfair labor

[5] At the hearing petitioner received full opportunity to show that the Union had not been freely chosen (Tr. 327–328, 355, 459, 614, 735, 845, 847, 859, 860–865, 867, 892, 903–904, 949–950).

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practice within the meaning of Section 8 (1) and (5) of the Act (B. A. 239). It therefore ordered petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (B. A. 239–241).

On October 24, 1942, the Board filed in the court below a petition for enforcement (B. A. 1–5). On January 5, 1943, petitioner filed with the court below a petition to dismiss the case as moot or in the alternative to remand the case to the Board for the taking of additional evidence, representing for the first time that an alleged change in the character of its operations subsequent to the Board's order had rendered obsolete the unit found by the Board to be appropriate for the purposes of collective bargaining, and, consequently, made compliance with the Board's order impossible (R. A. 108–110). On March 8, 1943, the court handed down its decision enforcing the Board's order with a single modification not here in issue and denying petitioner's motion to dismiss the case as moot (R. A. 116–124). On April 5, 1943, petitioner filed with the court below a petition for rehearing which the court denied (R. A. 127, 135). Accordingly, on April 30, 1943, a decree was entered (R. A. 135).

ARGUMENT

1. The court below held that the Board's proceedings under Section 9 (c) were fairly con-

ducted in accordance with the statute and the conclusions reached by the Board were fully warranted (R. A. 123). Petitioner apparently contends that the decision was in error because no question had arisen concerning the representation of petitioner's employees, and the Board was therefore without power to conduct an investigation and hold an election. The contention is without merit.

The jurisdiction of the Board was invoked by a labor organization claiming to represent petitioner's employees and showing to the Board that a substantial number of the employees desired the representation of a bargaining agent (*supra,* p. 5). It requested that the Board conduct an investigation and hold an election to determine who the employees desired to represent them (B. A. 180; App. 19). The Board did so upon finding that a substantial number of employees had designated the Union as their bargaining representative and that petitioner had controverted the bargaining authority of both Local 21107 and its successor, the Union (*supra,* pp. 4, 6–7). There is therefore abundant support for the Board's conclusion that a controversy concerning representation existed between petitioner and its employees. In these circumstances, petitioner's suggestion that the Board abused its discretion in conducting an investigation and holding an election has no rational foundation.

2. Petitioner complains (Pet. 8, 10) of the Board's ruling in rejecting an offer to prove that some of the authorization cards submitted at the representation hearing as evidence of interest in representation had either been forged or had been obtained by misrepresentations of fact.

The challenge of this ruling raises no question worthy of review. The Board's refusal in the representation proceeding to permit an extensive exploration of the Union's representative status was manifestly proper. In such proceedings, where, as here, an election is contemplated and not a certification upon the record, the Board merely requires for the purpose of showing that a question concerning representation has arisen, a demonstration of an interest in representation on the part of the petitioning union and does not permit a challenge of apparently genuine authorizations in the manner sought by petitioner. The showing of such an interest in representation is merely an administrative requirement to advise the Board, as a preliminary matter, that there is a sufficient justification for proceeding with the investigation of representatives.[6]

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[6] See *Matter of R. H. Siskin & Sons*, 41 N. L. R. B. 187, 188–189; *Matter of Interlake Iron Corp.*, 38 N. L. R. B. 139, 142–143; *Matter of H. G. Hill Stores*, 39 N. L. R. B. 874, 876. In consequence of petitioner's refusal to submit its pay roll for the purpose of checking the authorization cards they were examined with unusual care by the Trial Examiner during the course of the hearing. They appeared to him to bear original signatures of petitioner's employees and to be otherwise genuine (Rep. Tr. 83, App. 19–24).

The Board is not required prior to its investigation to determine with greater accuracy than it did here the extent of an interest in representation. Certainly it was not required to do so here when petitioner had conceded the existence of such an interest (*supra*, p. 5).

Moreover, even if neither the authorization cards nor the history of bargaining relations in petitioner's plant reflected an interest in representation, the Board's decision to hold an election did not prejudice petitioner. For it is plain that an employer has no right under the statute or otherwise to compel a union to prove a majority by a method other than a Board-ordered election and that absent a showing of prejudice, petitioner's contentions with respect to the Board's investigation of representation present no question worthy of review.[7]

3. Petitioner's unparticularized discussion (Pet. 9, 10) of the scope and adequacy of judicial review of Board proceedings under Section 9 (c) of the Act and the constitutionality thereof pre-

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[7] Cf. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76, 83 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Air Associates*, 121 F. (2d) 586 (C. C. A. 2); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689.

sents no question not already passed upon by this Court in a number of cases. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31.

4. The court below did not err in its denial of petitioner's motion to dismiss the case as moot. The asserted change in petitioner's business upon the basis of which it sought dismissal of the case was in no way shown to have affected petitioner's present capacity to comply with the Board's order or to have rendered the certification obsolete. Cf. *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *National Labor Relations Board* v. *Calumet Steel Division of Borg-Warner Corp.*, 121 F. (2d) 366, 370 (C. C. A. 7); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 640 (C. C. A. 4).

CONCLUSION

The decision of the court below sustaining the Board's findings and order is correct and presents

neither a conflict of decisions nor any questions of general importance. The petition should, therefore, be denied.

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